

This letter discusses Illinois sales taxes, nexus, local taxes, and warranties. See 35 ILCS 120/1 et seq. (This is a GIL.)

June 6, 2007

Dear Xxxxx:

This letter is in response to your letter dated March 29, 2006, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.ILTAX.com](http://www.ILTAX.com) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

### **Background**

ABC is a STATE corporation with (chain store) type clients that have central management and many branch locations throughout the United States. ABC has contracted with their clients to provide repair services on computers and peripheral devices (i.e., printers, CPUs, monitors, etc.) owned by the client. ABC also provides Information Technology (IT) management services to their clients.

ABC would like to request direction and/or a 'Letter of Determination' as to its' [sic] responsibility in charging, collecting, reporting and remitting applicable state and local sales and use and or gross receipts tax for each of the types of business activities listed below:

1. **Break/fix warranty services** - Client is billed a fixed monthly amount on Warranty coverage on a range of different IT Equipment. The warranty is a 'non manufacturer's' warranty. The client will contact ABC when a covered item needs repairs. When ABC receives the service request in it's [sic] LOCATION2 workshop, an employee (technician) is assigned to configure, or otherwise prepare the Client owned replacement equipment to be shipped to the customer location where the repair request originated (usually at locations outside of LOCATION2). When the customer receives the replacement equipment, the

Customer will then ship the defective /broke item(s) back to ABC's LOCATION2 shop to be fixed. This is in effect, is [sic] called ABC's Warranty service.

2. **Break/Fix Time and Materials Repair Contracts** - ABC also offers the same type program to clients under time and materials contracts. This service would operate like the regular break/fix contract (repairs are performed in LOCATION2) except the customer would be billed under a time and materials basis at the time of the repair, rather than a flat rate monthly billing under a warranty contract.
3. **Deployment, Installment, Destruction** - When an asset is activated under the Warranty contract services such as deployment of the new asset, installing the new asset and destroying the old asset is covered. However, when these services are performed on an individual basis and assets aren't covered under contract, separate charges (fees) are assessed for each service on a time and materials basis.
4. **On-Site Repair Services** - ABC provides other services than break/fix hot swap. It also warranties printers and other large peripherals. ABC's customers will have service requests on printers that are too large to ship to ABC's central Depot in LOCATION2. In such cases technicians are dispatched to the customer's location to analyze and fix the problem. These technicians are Independent 3<sup>rd</sup> party contractors. They are not employees of ABC and have their own insurance coverage and businesses. ABC gives very little direction other than alerting the contractor of the problem and where the customer is located. ABC will also try and schedule the call and alert the client of when the technician will arrive on location. The service and fees charged by the 3rd party contractors are sometimes covered by the warranty contract and sometimes not (depending on the problem and it's source). ABC is entitled to bill for services that are not covered by the contract separately. Since this involves a separate billing scheme, we have treated billing for these services (Time and Materials) separately from the warranty arrangement.
5. **Warehousing** - ABC charges their clients a monthly warehousing fee for storage of the client's spares [sic] pool of assets at the LOCATION2 shop. The fee is charged based on square foot usage.
6. **Project Services** - ABC performs a host of other services for its clients on a 'Project' basis. Projects for ABC include **Deploying** (Rolling Out Equipment), **Installing** (Configuring, Installing and setting up workstations and equipment), **Destruction** (destruction and disposal of IT and other electronic equipment) A project is defined by ABC when a customer is planning on doing a particular service on a large scale at the same time. (A typical project would be to deploy 1000 computer monitors for the Administrative Department of General Motors.)
7. **Asset Tracking Fees** - ABC provides a service of asset tracking for its customers. This service includes monitoring, updating and changing the data base for movement of IT assets within a company. ABC uses it's [sic] own proprietary software to perform this service. The software provides the exact location, age, service history and other vital information which the customer may want to track for its own reporting and management analysis. This service is not part of any Warranty contract and is provided to the customer as an additional service.

## **Where ABC's Employees Reside and Work**

**LOCATION1.** ABC has Executive Management, Administrative and Sales employees that reside and work in LOCATION1. None of the LOCATION1 employees are involved in the technical, logistical and/or repair operation in LOCATION2.

**LOCATION2.** All employees who work and reside in STATE2 are responsible for performing the Depot services offered by ABC at the STATE2 warehouse facility.

**LOCATION3.** There is one employee that resides and works out of their home in STATE3. The employee is Manager of Project Services.

## **Issues**

- What are the registration requirements for our business as it relates to the activities described?
- What activities are taxable (other than State income if applicable) for purposes of State, City and or Local Sales and Use tax?
- What taxes are applicable to each of the listed business activities?
- How should each category of business above be sourced /characterize on the tax return?
- If City and or local sales tax is applicable, please provide contact, proper address and forms (if applicable) that need to be filed for those agencies.
- Please provide (applicable) rate schedules for State and/or City and local taxes.
- Please confirm frequency of reporting and payment to applicable tax agency.

Thank you very much for your time and consideration. I thank you in advance for your expeditious and courteous response.

## **DEPARTMENT'S RESPONSE**

### **Illinois sales taxes**

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. The Use Tax Act imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. See 86 Ill. Adm. Code 150.101. If no tangible personal property is being transferred to the customers, then no Illinois Retailers' Occupation Tax or Use Tax would apply.

Likewise, the Service Occupation Tax Act and Service Use Tax are imposed on the transfer of tangible personal property incident to sales of service. See 86 Ill. Adm. Code 140.101 and 160.101. If

no tangible personal property is being transferred to the customers incident to the services provided then no Illinois Service Occupation Tax nor Service Use Tax would apply.

## **Nexus**

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you.

Determinations regarding the subject of nexus are normally very fact specific. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your company would be considered a retailer subject to sales tax collection obligations.

Whether a retailer is subject to Illinois Retailers' Occupation Tax (sales tax) liability or is required to collect Illinois Use Tax from its Illinois customers depends upon whether that retailer has sufficient "nexus" with the State of Illinois so that the retailer will be subject to Illinois law. The following information outlines the principles of nexus.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the

out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

Information regarding registration and reporting periods is available on the Department's website.

## **Local taxes**

In general, the imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. See 86 Ill. Adm. Code 270.115(b), enclosed. The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred.

If a purchase order is accepted outside the State, but the property being sold is located in an inventory of the retailer which is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which the retailer has nexus, but both the purchase order acceptance and the location of the property being purchased are outside of the State of Illinois, such sales would only be subject to the Illinois Use Tax at the rate of 6.25%.

Although the regulation cited above (86 Ill. Adm. Code 270.115) deals with the municipal home rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department. Tax rates for local taxes that the Department administers are available on the Department's web site.

For information regarding local taxes not administered by the Department, you may contact local jurisdictions.

## **Warranties**

In general, maintenance agreements that cover computer software and hardware are treated the same as maintenance agreements for other types of tangible personal property. See Section 130.1935(b). The taxability of maintenance agreements depends upon if the charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. No tax is incurred on the maintenance services or parts when the repair or servicing is performed.

If maintenance agreements are sold separately from tangible personal property, sales of the agreements are not taxable transactions. However, when maintenance services or parts are provided under the maintenance agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See 86 Ill. Adm. Code 140.301(b)(3), enclosed.

Charges for updates of canned software are fully taxable under Section 130.1935(b). If the updates qualify as custom software under Section 130.1935(c), they may not be taxable. But, if maintenance agreements provide for updates of canned software, and the charges for those updates are not separately stated and taxed, then the whole agreements would be taxable as sales of canned software.

Charges for telephone support, training, installation, configuration, and troubleshooting are exempt if they are separately stated from the selling price of canned software. See Section 130.1935(b). If these services are provided in conjunction with a sale of custom computer software or a license of computer software, the charges for those services are not subject to tax.

If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote  
Associate Counsel

MPM:msk